HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8696 OF 2003.

Chandrabhaga Damodar Vanjari,
(Deceased Through L.Rs.)
Sou. Chhabutai Gangadhar Navathe,
R/o: Vadnera Rd, Navatha Nagar,
Amravati. ..Petitioner.

Versus.

1. Priyanka Murlidhar Navahte,
(minor) through her Guardian
father Murlidhar Navathe.

2. Balasaheb Sukhdeo Pakhale,
Age: 49 yrs, R/o: Madangavi,
Tal: Nashik.

3. Kamal Rajdhar Patil
(Deceased).
Heirs not brought on record
in original suit. ..Respondents.

Shri. Prafulla B. Shah for the Petitioner.

Shri. Kishore Patil i/b Shri. P. N. Joshi for the respondent no.2.

CORAM: S.B.MHASE, J.

DATE : JULY 19, 2006.

ORAL JUDGMENT.:

1. Heard. Rule returnable forthwith with the consent of parties.

2. The petitioner has approached to this Court invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

3. Special Civil Suit No. 209 of 1994 was filed in the Court of Civil Judge, Senior Division, Nashik. In the said suit, there were three defendants, Defendant No.1 was minor represented by his next friend - mother, who was defendant no.2 in the said suit. Apart from this, Balasaheb Sukdev Pakhale was also a party as defendant no.3, who is respondent no.2 in the present matter. It appears that original defendant no.2 - Kamal died during the pendency of the suit and since she was defendant no.2 and next friend of defendant no.1, the Civil Judge, Senior Division, Nashik passed order that the suit is abatted as against the defendant nos. 1 & 2. Validity of the said order is not subject matter of the present petition. However, the fact remains that the suit survives as against the original defendant no.3 who was purchaser of the said property. It was fixed for hearing on 17.12.1996. On the said date, plaintiff - petitioner herein was absent and therefore application Exhibit 30 was submitted for adjournment supported by a medical certificate. Inspite of this, the said adjournment application was rejected by the Civil Judge, Senior Division, Nashik, and since the said application was rejected and the plaintiff was absent, the Civil Judge, Senior Division wanted to proceed with the suit, but

under the circumstances, the suit was dismissed for want of prosecution. On the same day, application Exhibit 31 was filed by Advocate of the plaintiff for restoration of the suit. It is interesting to note that on that day it appears that defendant and defendant's counsel, both were absent. Therefore, it became necessary for the Court to issue notice of the said application to the defendants. On 16.9.1997 application Exhibit 31 was on record and service report was awaited. It further appears that the defendant was not served, therefore he did not appear. But, however having found that the plaintiff and his counsel absent, Court dismissed the suit for non prosecution and/or default. As against this order, the Miscellaneous Civil Appeal bearing No. 235 of 1997 was preferred. Said appeal was dismissed on 17th October 2000. Therefore, being aggrieved and dissatisfied by these orders passed by the Courts below, the plaintiff-petitioner has approached to this Court invoking the jurisdiction of this Court under Article 226 of the Constitution of India, as stated earlier.

4. Learned counsel Shri. P.B.Shah appearing for the petitioner submitted that the main contesting defendant, namely, defendant no.3 purchaser was on record and the suit was surviving as against the

defendant no.3. It was property of the defendant nos. 1 & 2 which was transferred in favour of the defendant no.3 and the said transaction was challenged by the plaintiff. He submitted that the application for adjournment (Exhibit-30) was given being supported by the medical certificate and therefore there is no reason for the Court to reject the said application. Therefore, the very act of the dismissal of suit for non prosecution is unjust and illegal one. He further submitted that the trial Court failed to note that on that date even the defendant no.3 and his counsel were absent. Therefore, this was a genuine case wherein the adjournment should have been granted by the trial Court. He further submitted that there was nothing to be done so as to proceed with the matter on the part of the plaintiff and plaintiff's advocate. Ultimately, he submitted that the ends of justice require that there should be substantive trial of the issues involved in the matter. He submitted that both the Courts below have overlooked the fact that parties approached to them for substantial justice and for not being defeated in the Court on technical grounds. He submitted that if orders are passed in such fashion, the litigants will loose faith in justice delivery system, and, therefore submitted that under the superintending powers of this Court, the whole proceeding may be sent

to the trial Court so as to have proper adjudication in the matter.

5. Learned counsel appearing for the respondent no.2 vehemently opposed these submissions made by the learned counsel for the petitioner. He submitted that the suit was abatted as against the defendant nos. 1 & 2 and no steps were taken by the plaintiff- petitioner to bring on record the heirs of defendant nos. 1 & 2. Therefore, he submitted that, it is improper to restore the said suit.

6. It is interesting to note that so far as the submission of applications (Exhibit 30 & 31) is concerned there is no challenge on the part of the respondent No. 2 (original defendant no.3), namely, such applications were made is a fact on record. If the application exhibit 30 was supported by a medical certificate, even though the said medical certificate might not be disclosing as to whether the plaintiff had recovered or not and/or was fit or not to attend the Court, etc., still it was sufficient reason where adjournment is to be granted or the Court should have granted an adjournment for a reasonable period with a further directions to bring appropriate medical certificate. Why such a course was not adopted by the

trial Court is not known from the record. Apart from that, when on 16.9.1997, application exhibit 31 was rejected, it was not ready for hearing and on that day, it was for "awaited service", namely, awaiting report of service of said application on defendant. Defendant No.2 was also not present in the Court on that day. Therefore, simply on hypertechnical ground the suit was dismissed by the trial Court. It requires to be noted that where the plaintiff had taken steps to bring the heirs of defendant no.2 on record is a different question. Because what is the effect of the order of the adjournment so far as defendant no.2 is concerned is a separate issue to be considered in the trial, if raised by the parties. The whole question is whether the act on the part of the trial Court to dismiss the suit under the abovereferred circumstances is just and proper calls for consideration of this Court. It requires no comment and finding from this Court that the act of dismissal of the suit and thereafter the dismissal of application exhibit 31 is absolutely illegal and unjustified. Such orders can be passed when Courts loose sense of justice and become a hypertechnical instrumentalities of justice delivery system. Without going into much comments in this aspect, it is hereby found that the orders passed by the Courts below are improper and unjust and they are

hereby quashed and set aside. Special Civil Suit No. 209 of 1994 is hereby restored to its original file. Writ petition is allowed in the above terms and is disposed of accordingly. Rule made absolute accordingly.

(S.B.MHASE, J.)